STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 4, 2007
V	No. 248038 Calhoun Circuit Court
MICHAEL BART MILESKI, Defendant-Appellant.	LC No. 02-003738-FC ON REMAND

Before: Wilder, P.J., and Zahra and Meter, JJ.

PER CURIAM.

This case is again before us on remand from our Supreme Court. In our previous decision, we reversed and remanded for a new trial, because defendant's right to confront the witnesses against him was infringed under *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). *People v Mileski*, unpublished opinion per curiam of the Court of Appeals, issued November 4, 2004 (Docket No. 248038). Our Supreme Court initially granted leave to appeal. *People v Mileski*, 472 Mich 927; 697 NW2d 527 (2005). But the Court then held the case in abeyance pending certain action from the United States Supreme Court. *People v Mileski*, ___ Mich ___; 705 NW2d 687 (2006). After the decision in *Davis v Washington*, ___ US ____; 126 S Ct 2266; 165 L Ed 2d 224 (2006), our Supreme Court vacated its grant of leave and remanded this case to this Court for reconsideration in light of *Davis*. *People v Mileski*, ___ Mich ___; 720 NW2d 752 (2006). On remand, we again reverse and remand because defendant's right to confront the witnesses against him was infringed.

I.

The complaining witness did not appear at trial. A neighbor, Starr Foreman, testified that the complainant told her she had been dragged up the stairs by her hair, threatened at knifepoint, and then raped, that she ran down the steps, got out of the house and ran down the street naked to escape, and that defendant, while in the nude, ran down the street after her with the knife.

A police officer who responded to the neighbor's house testified that the complainant, "still 'shaking and trembling,'" told him that defendant "grabbed her by her arms and her hair, and began to drag her up the stairs . . . , and then he got on top of her . . . and then he . . . ripped all of her clothes off . . . ." The officer continued:

> She said then he took all of his clothes off to where he, too, had nothing on, and began to have sex with her. She said that he penetrated her with his penis both vaginally and anally on the stairs. She said after a little while of that, he took her and drug her the rest of the way up the stairs to the bedroom, putting her on the bed. She said on the headboard of the bed he had a large knife. He took the knife and he kept threatening her with it, telling her that he was going to hurt her with it, and that if she didn't cooperate, he was going to get more angry and cause her harm. She said then he forced his penis into her mouth. . . . [She said] there was a time that she was able to get away, where she fled down the stairs and out the back door, and began running down the street. She said while she was running down the street she had no clothes on, and he was chasing her down the street [without] clothes on. She noticed that he may have chased her for a block, maybe a little bit longer, and she continued to run . . . .

A nurse specializing in sexual assault examinations testified that the complainant told her that defendant had anally, vaginally, and orally assaulted her, elaborating that defendant had vaginally assaulted her on the stairway before dragging her up the stairs to the bedroom, then anally assaulted her there. The nurse continued that the complainant indicated that because the anal penetration was so painful, she had performed oral sex until she was able to escape.

The prosecution charged defendant with three counts of first-degree criminal sexual conduct, MCL 750.520b, involving vaginal, anal, and oral penetration. The jury found defendant guilty of only the count involving anal penetration. The trial court sentenced defendant to serve a term of imprisonment of twenty-five to fifty years.

II.

A party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001); MRE 103(a)(1). Assertion of an evidentiary objection does not preserve a constitutional objection based on the confrontation clause. *People v Moorer*, 262 Mich App 64, 67; 683 NW2d 736 (2004); *People v Geno*, 261 Mich App 624, 629-630; 683 NW2d 687 (2004). Here, defendant objected to the evidence in question. (Defendant moved for a mistrial during voir dire based on a failure to produce the complainant as a witness.)

Crawford applies retrospectively to cases pending on direct appeal at the time it was decided. *People v Bell (On Second Remand)*, 264 Mich App 58, 62; 689 NW2d 732 (2004). *Geno* held that the defendant failed to establish that *Crawford* was retroactively applicable where the defendant failed to preserve the confrontation issue at trial. *Geno, supra*, p 630. However, here defendant preserved the confrontation clause issue. Accordingly, *Crawford* is applicable. Admissibility issues involving questions of law are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). This Court also reviews de novo claims of constitutional error. *People v McPherson*, 263 Mich App 124, 133; 687 NW2d 370 (2004).

III.

Defendant's principal issue on appeal is that he was denied his right to confrontation guaranteed by the United States (US Const, Am VI and Am XIV) and Michigan constitutions (Const 1963, art 1, § 20[1]) by the admission into evidence of the complainant's out-of-court statements, in lieu of in-court testimony. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." US Const, Am VI. To preserve this right, testimonial hearsay is inadmissible against a criminal defendant unless the declarant is unavailable and there was a prior opportunity for cross-examination of the declarant. *Crawford, supra* at 58; *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005). *Crawford* held: "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford, supra* at 68. Further, by operation of the Fourteenth Amendment, "[t]his bedrock procedural guaranty applies to both federal and state prosecutions." *Crawford, supra* at 58. Thus, *Crawford* articulated a bright-line rule against admission of custodial statements by a nontestifying witness against a criminal defendant. *Id.*

Davis further defined "testimonial statements":

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. [*Davis, supra*, 126 S Ct 2273-2274.]

Accordingly, a recording of the early parts of conversation between a victim of domestic abuse and a 911 operator, in which the victim mainly described her present state of distress and need for assistance, was nontestimonial, and therefore not absolutely excluded by the confrontation clause, and thus was subject to admission in accordance with applicable hearsay exceptions.[2] See *id.* at 2271, 2277; *People v Walker (On Remand)*, ___ Mich App ___; ___ NW2d ___ (Docket No. 250006, 2006), slip op, p 3. Conversely, where the police responded to a report of a domestic disturbance, separated a woman from her suspected aggressor, extracted an account of violence from the woman, then had the woman fill out and sign a "battery affidavit," a police officer's account of what the woman had told him on that occasion presented testimonial statements which were absolutely excluded by the confrontation clause, notwithstanding hearsay

[1] The Michigan constitution provides: "In every criminal prosecution, the accused shall have the right . . . to be confronted with the witnesses against him or her . . . ." (Const 1963, art 1, § 20.)

[2] Michigan jurisprudence may admit such statements as present-sense impressions, MRE 803(1), excited utterances MRE 803(2), statements of then-existing mental or physical condition, MRE 803(3), or statements made for purposes of medical treatment, MRE 803(4).

exceptions for excited utterances and present-sense impressions. *Davis, supra* at 2272-2273, 2278[3]; *Walker (On Remand), supra*, slip op, p 3.

Here, defendant made issue of three sets of hearsay statements: those the complainant made to her neighbor, Starr Foreman, when initially seeking help, those she later made to the police officer, and those she made still later to the nurse. We consider each set of statements in turn.

In the first set of statements, to the neighbor, the complainant explained her situation for the sake of obtaining immediate relief, while including no specifics concerning the sexual acts involved. Defendant conceded that these remarks were "not 'testimonial' as the term is defined by *Crawford* . . . ." This hearsay is nontestimonial. The complainant made these statements to obtain a position of temporary safety. She was seeking to explain her situation, maintain some security, and obtain some assistance, not to create a record to be used against defendant. *Davis, supra*, 126 S Ct 2273-2274.

However, the remarks the complainant made to the police officer, and to the investigating nurse, had less to do with quelling an emergency than with building a case against defendant. *Davis, supra*, 126 S Ct 2273-2274. Accordingly, even if those remarks qualified as excited utterances or some other form of excepted hearsay, they were nonetheless testimonial in nature and thus barred. *Id*.

When the trial court commits an error that denies defendant his constitutional right to confrontation, the verdict must be reversed, unless the prosecution, as the beneficiary of the error, establishes that the error is harmless beyond a reasonable doubt. *Shepherd, supra* at 348. We conclude that the prosecution has not sustained this burden. Because the complainant did not testify, the prosecution's case rested primarily on the three hearsay statements made by the complainant. Without the two improperly admitted statements, there was no evidence regarding the specifics of the acts of penetration or how those acts were accomplished. Further, the improperly admitted statements also significantly bolstered the prosecutor's case, rebutted defendant's defense of consent, and were not cumulative to complainant's statement to Starr Foreman. Following our review of the trial record, we affirm our prior conclusion that the prosecutor failed to establish that the constitutional errors were harmless beyond a reasonable doubt. *Davis* affords us no occasion to change our conclusion on this issue.

In view of our disposition of the confrontation issue, the other issues raised by defendant are moot. *People v Rutherford,* 208 Mich App 198, 204; 526 NW2d 620 (1994).

[3] *Davis* reiterated that a defendant who procures the witness's absence at trial thereby forfeits confrontation clause objections, but did not decide whether that exception applied in that case. 126 S Ct at 2280.

IV.

Under *Davis*, two of the three disputed sets of hearsay statements by the complainant were testimonial statements inadmissible under the confrontation clause, because the declarant (complainant) failed to appear at trial and because defendant had no opportunity to cross-examine the declarant at the time the hearsay statements were made. The error was not harmless, because the hearsay statements were the principal parts of the evidence against defendant.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Brian K. Zahra
/s/ Patrick M. Meter